(3)

Supreme Court, U.S.
FILED
MAY 14 2002
CLERK

No. 01-1111

IN THE

Supreme Court of the United States

ROBERT H. HOFFMANN, HEIDEMARIE KRÜGER, SUSANNE HUSTÄDT, ESTATE OF HENRIETTE HOFFMANN VON SCHIRACH, DR. KLAUS VON SCHIRACH, EXECUTOR, and BILLY F. PRICE,

Petitioners,

v.

UNITED STATES and JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

SHELLEY J. CASHION
P.O. Box 580039
Houston, Texas 77258-0039

ROBERT I. WHITE
Counsel of Record
CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN
1200 Smith Street, Suite 1400
Houston, Texas 77002-4310
(713) 658-1818

Attorneys for Petitioners

173905

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

15 pg

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Point 1. Res Judicata	1
Point 2. 1954 Treaty	4
Point 3. New Facts	9
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Bunker Ramo Corp. v. United Bus. Forms, Inc., 713 F.2d 1272 (1983) 1

Charchenko v. City of Stillwater, 47 F.3d 981 (8th Cir. 1995) 3

Costello v. United States, 365 U.S. 265 (1961) 2

In re Camp, 59 F.3d 548 (5th Cir. 1995) 2

Landsberg v. Scrabble Crossword Game Players, Inc., 802 F.2d 1193 (9th Cir. 1986) 3

Owen v. United States, 20 Cl. Ct. 574 (1990) 3

Pegues v. Morehouse Parish School Bd., 706 F.2d 735 (5th Cir. 1983) 3

Pueblo de Taos v. Archuleta, 64 F.2d 807 (10th Cir. 1933) 3

Statute:

28 U.S.C. § 2680(k) 1

Cited Authorities

Page

Rules:

FED. R. CIV. P. 41(b) 2, 3

United States Supreme Court Rule 15.6 1

Other Authorities:

Convention on Settlement of Matters Arising Out of the War and the Occupation signed October 23, 1954, 6 U.S.T. 4411, T.I.A.S. No. 3425 (1954) ..... *passim*

Hague Convention Respecting the Laws and Customs of War on Land, 36 Stat. 227, 1 Bevans 631 (1907) 6-7

Section 20 of the RESTATEMENT (SECOND) OF JUDGMENTS (1980) 3

Pursuant to Rule 15.6, Petitioners hereby reply to new points raised in the Brief in Opposition filed by the United States ("the government"):

Point 1. *Res Judicata*

The government argues that petitioners' claims are barred by res judicata, because of the decision of the Fifth Circuit in the 1983 Case. (Opp. 15). In its opinion the Fifth Circuit dismissed petitioners' complaint in the 1983 Case as to both the watercolors and the photographs because the district court lacked subject matter jurisdiction. As to the watercolors, the court concluded that petitioners' tort claim arose in Germany and that 28 U.S.C. § 2680(k) explicitly excludes such claims from actionable FTCA claims. As to the photographs, the court concluded that petitioners' complaint was filed prematurely, before the FTCA claims were on file with the government for the required six months. The Fifth Circuit thus dismissed the complaint for lack of subject matter jurisdiction, characterizing the dismissals as being "with prejudice." (*See* Opp. 4 & 7, where the same statements are made).

Notwithstanding the Fifth Circuit's characterization, as a matter of law the dismissals could not and did not result in adjudications on the merits, and the Fifth Circuit's opinion thus could not have res judicata effect. In *Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272, 1279 (1983), the Seventh Circuit stated the undisputed controlling legal principle (citations omitted):

> Once a court expresses the view that it lacks jurisdiction, the court thereafter does not have the power to rule on any other matter. Any finding

> made by a court when the court has determined that it does not have subject matter jurisdiction carries no res judicata consequences.

There is no dispute as to this legal principle in the Fifth Circuit, a fact which that court overlooked in its 1996 opinion in the 1983 Case. *In re Camp*, 59 F.3d 548, 550-51 (5th Cir. 1995) (judgment by court lacking subject matter jurisdiction has no res judicata effect). Nor is this principle disputed in the other federal courts: Petitioners' brief in the district court in the instant case (pp. 145-146) cited *Costello v. United States*, 365 U.S. 265, 284-286 (1961), and 11 appellate court decisions that support the proposition that dismissals for lack of subject matter jurisdiction are not adjudications on the merits.

Rule 41(b), RULES OF CIVIL PROCEDURE, is consistent with this case law. That Rule does not use the phrases "with prejudice" or "without prejudice," but rather relies on "adjudication upon the merits" to indicate when a dismissal has res judicata effect. Rule 41(b) states that dismissals for lack of jurisdiction, venue or failure to join a party are not adjudications upon the merits.

In the 1983 Case, the Fifth Circuit did not state that it was effecting "an adjudication upon the merits" as to any of petitioners' claims. When it stated that the dismissals as to the watercolors and vested photographs were "with prejudice," as a matter of law such dismissals were not adjudications upon the merits and had no res judicata effect that would preclude all other causes of action based on the underlying facts.

Section 20 of the RESTATEMENT (SECOND) OF JUDGMENTS (1980), is in accord. Comment "d" states that, under FED. R. CIV. P. 41(b), courts may not dismiss claims for lack of jurisdiction with prejudice.

Further, even if any statements made by the Fifth Circuit are thought to characterize the dismissal of the 1983 Case as an adjudication on the merits, such would be *obiter dicta*. *Pegues v. Morehouse Parish School Bd.*, 706 F.2d 735, 738 (5th Cir. 1983). For this reason, use of the words "with prejudice" in describing the dismissal does not preclude a finding by another court that the dismissal had no res judicata effect. *Charchenko v. City of Stillwater*, 47 F.3d 981, 985 (8th Cir. 1995) (judgment recited that claims were dismissed "with prejudice"; *held*, dismissal for lack of subject matter jurisdiction has no res judicata effect); *Pueblo de Taos v. Archuleta*, 64 F.2d 807, 812 (10th Cir. 1933) (use of the words "with prejudice" in a judgment does not enlarge the effect of a judgment as res judicata if the record indicates that it was not an adjudication on the merits). *See Owen v. United States*, 20 Cl. Ct. 574, 575 n.1. (1990); *Landsberg v. Scrabble Crossword Game Players, Inc.*, 802 F.2d 1193, 1197 (9th Cir. 1986).

Further, the instant case was filed in 1989, raising all of the non-FTCA claims for the explicit purpose of litigating same in the event the Fifth Circuit held that the S.D. Tex. had no FTCA subject matter jurisdiction in the 1983 Case. This case was carefully held in abeyance for six years until the Fifth Circuit, in 1996, dismissed the 1983 Case for want of subject matter jurisdiction.

Point 2. *1954 Treaty*

The government argues that the Convention on Settlement of Matters Arising Out of the War and the Occupation signed October 23, 1954, 6 U.S.T. 4411, T.I.A.S. No. 3425 (1954) (the "1954 Treaty") bars petitioners' claims in this case. (Opp. 15-16). Such argument (a) mischaracterizes petitioners' cause of action as a complaint about the Army taking custody and control in May 1945 of the watercolors and the photographs, (b) expands the 1954 Treaty beyond its language, (c) conflicts with other treaties binding upon the United States, and (d) ignores the government's failure to introduce any evidence supporting the factual underpinnings of application of the 1954 Treaty.

The 1954 Treaty contains two provisions that might be applicable. First, Article 1 of Chapter IX provides:

> Without prejudice to the terms of a peace settlement with Germany, *German nationals* who are subject to the jurisdiction of the Federal Republic *shall not assert* against countries which have signed or acceded to the United Nations Declaration of 1 January 1942, or have been at war with Germany, or are specified in Article 5 of Chapter 5 of the present Convention, or against the nationals of such countries, *claims of any description arising out of actions taken or authorized by the Governments of these countries between 1 September 1939 and 5 June 1945 because of the existence of a state of war in Europe*, nor shall such claims be asserted in any court of the Federal Republic by any person. [Emphasis added.]

Then, Article 3 of Chapter IX provides (6 U.S.T. at 4504-5):

* * *

> 2. The Federal Republic recognizes that *no claims of any kind arising out of acts or omissions* of the Three Powers or any of them or of organizations or persons who have acted on their behalf or under their authority, which took place in respect of Germany, German nationals or German property, or in Germany, *between 5 June 1945 and the entry into force of the present Convention, may be asserted by the Federal Republic or by persons subject to its jurisdiction* against the Three Powers or any one of them or against organizations or persons who have acted on their behalf or under their authority. [Emphasis added.]

These provisions of the 1954 Treaty are inapplicable, because petitioners are asserting neither:

> (a) claims of any description arising out of actions taken [by the Allies] . . . between 1 September 1939 and 5 June 1945 because of the existence of a state of war in Europe under Article 1, nor
>
> (b) claims for acts or omissions [tort claims] against any one of the occupying powers for events that occurred between June 5, 1945 and 1954.

Petitioners do not base their claims of ownership of the watercolors or photographs on anything that occurred

between 1939 and 1954 or that "arose" from actions during the dates specified in the treaty. Petitioners' claims "arose" as a result of their ownership of property, and the denial in 1983 of their right to possession of such property by the United States. No complaint is made of any event during the period from September 1, 1939 until 1983 (other than the FTCA tort of conspiracy that occurred in the United States in 1951 to have a "vesting order" signed as to some of the photographs). In fact, if the government had not taken lawful control and possession of the watercolors and photographs under the Hague Conventions, just as it did millions of other valuable artworks, and safeguarded all of these properties at the end of the war, the watercolors and photographs, and artworks belonging to thousands of other people, likely would have been stolen by looters and lost forever. For these reasons alone, the 1954 Treaty is inapplicable.

The United States is a party to the Hague Conventions, the relevant portions of which are (Hague Convention Respecting the Laws and Customs of War on Land, 36 Stat. 227, 1 Bevans 631 (1907)):

> Article 46. Family honour and rights, the lives of persons, and *private property*, as well as religious convictions and practice, *must be respected.*
>
> *Private property cannot be confiscated.*
>
> Article 47. *Pillage is formally forbidden.*
>
> * * *
>
> Article 56. The property of municipalities, that of institutions dedicated to religion, charity and

> education, the arts and sciences, even when State property, shall be treated as private property.
>
> *All seizure of*, destruction or willful damage done to institutions of this character, historic monuments, *works of art and science, is forbidden, and should be made the subject of legal proceedings*. (Emphasis added.)

These provisions, when read with other provisions of the Hague Conventions, make it clear that confiscation of private property is forbidden, but seizure of private property for use is permitted, subject to the fiduciary mandate of accounting for, returning and paying compensation.

The foregoing provisions make it quite clear that under no circumstances can there have been any adverse taking of the watercolors or photographs unless during the war the taking was accomplished because of military necessity. Here, the Army's taking control of the watercolors and photographs was well *after* the hostilities and fighting had ended in May 1945. Certainly, the government introduced no factual support to the contrary.

The government's argument seems to be that the 1954 Treaty precludes claims of any type brought by German plaintiffs after World War II. This interpretation ignores the limiting language "because of the existence of a state of war" and "authorized by the Governments of these countries." Thus, even if petitioners were complaining of the May 1945 taking, the government has offered no proof that the Army's taking custody of the watercolors and photographs occurred "because of the existence of a state of war" and was authorized by the Governments, so the 1954 Treaty cannot bar those claims.

The Treaty must be restricted to what it was obviously intended to govern. For example, a German armament factory owner would be precluded from making claims against the United States for bombs dropped on his factory during the course of the war, and claims for damage or destruction of hotels, private homes and property of all kind during the bombing and battles of the war would be precluded. And if a German national were working in New York in 1953 and is run over by a negligently-operated United States mail truck, that person's tort claim could not be affected by the treaty. Likewise, the lawful taking of possession by the United States of paintings or photographs prior to June 1, 1945 could only be the subject of claims, if after a reasonable period, the United States did not abide by its Hague Convention obligations and account for, return and compensate the owner for use by the United States of the chattels. The 1954 Treaty was intended to apply to a limited range of circumstances and must be confined to those circumstances.

Having said this, it is important to remember that petitioners did not have any claims in May of 1945 or anytime thereafter, until 1983. Petitioners' ancestors were the owners of the four watercolors and the photographs. The United States is not the owner. The taking of possession and control of these properties in Germany in May 1945 by the United States was for the altruistic purpose of returning the watercolors to their true owners and for using the photographs for prosecution of war crimes and for intelligence purposes. Under the Hague Conventions, there was no adverse taking. Rather, there was a taking custody or control or seizure (all words of art in the Hague Conventions) in a fiduciary capacity. The government cannot contort the facts to imply that a state of war existed on the dates of the taking in fiduciary capacity. Most importantly, the government offered

no evidence to demonstrate such facts. Thus, even assuming petitioners were complaining of events during the period covered by the 1954 Treaty, the government has no immunity from suit because the 1954 Treaty is inapplicable.

Point 3. *New Facts*

In its opposition, the government makes many grossly erroneous statements of fact:

a. "the four watercolors were acquired by Hoffmann from Hitler" and that Hoffmann was Hitler's "personal photographer." (Opp. 2). The record shows that Hoffmann was a photographer, not Hitler's personal photographer, who purchased three of the watercolors on the market, having received one as a gift from Hitler on Hoffmann's 50th birthday.

b. "The watercolors were transferred to the U.S. in 1945." (Opp 2). The record shows that the watercolors were held in Munich after 1945 for four years awaiting a claim from an owner, and in 1949, no owner having appeared, were transferred from Munich to Wiesbaden when the Munich facility was closed. Thereafter, an Army colonel toured the Wiesbaden facility and "picked up" the watercolors for "additions to the Army's collection." They were seized under the Hague Conventions in 1950 and shipped to the United States to be placed in an Army museum after that date.

c. "The photographic archive was used during the Nürnberg trials and in 1951 the Office of Alien Property vested ownership of the archive in the Attorney General." (Opp. 2). The record shows that about 20% of the photographs were in Nürnberg and the Army commander promised that such 20% would be returned to Hoffmann Jr, who was

recognized as the owner by the Army. But upon a 1949 command from Virginia, the 20% was seized under the Hague Convention and shipped to the United States for use in writing books about the war. Once the 20% arrived in Virginia, an Army general wrote that a "vesting order" should be signed as to those photographs in order to "strengthen the Army's legal hold" on the photographs. The remaining 80% of the photographs were turned over by the Army to the O.S.S. (now the CIA), intelligence branches of the Army and the Signal Corps and transported by them to the United States. No vesting order was signed as to the 80%.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT I. WHITE
Counsel of Record
CHAMBERLAIN, HRDLICKA,
WHITE, WILLIAMS & MARTIN
1200 Smith Street, Suite 1400
Houston, Texas 77002-4310
(713) 658-1818

SHELLEY J. CASHION
P.O. Box 580039
Houston, Texas 77258-0039

Attorneys for Petitioners

May 2002